impartiality of the third party in this case has never been questioned. It would be in question had the appellants been given the opportunity to challenge the result of the membership check. There is thus no substance in the appellants' complaint. Ground (b) must also fail.

At the hearing of this appeal a number of cases on natural justice was cited to us particularly by the learned Senior Federal Counsel who maintained that the words "shall not be questioned in any court" in sub-section (5) of section 8 oust the supervisory jurisdiction of a court of law, that is the High Court. The majority in the House of Lords in *Anisminic Ltd.* v. *The Foreign Compensation Commission and Another*[1] have held that those words are not sufficient to oust the jurisdiction of the court if the impugned determination or decision is a nullity. I need only quote the following words of Lord Reid on page 213:—

"... No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law."

Lord Reid, however, added —

"Undoubtedly such a provision protects every determination which is not a nullity."

In the instant case I can find nothing in the facts or in the argument which can lead me to the conclusion that the Minister's decision is a nullity. I do not propose to consider other cases on natural justice for the reason that they do not seem to cover the present situation.

Accordingly, I would dismiss this appeal with costs. Deposit to respondents.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Skrine & Co.*

H. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.)

May 25, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 93 of 1973]

Income Tax — Termination of service — Payment of compensation — Whether gratuity in respect of having or exercising employment or compensation for loss of employment — Whether payment was a voluntary one — Income Tax Act, 1967, ss. 3(a), 4(b), 13(1)(a) and (e) and Schedule to paragraph 15(1)(b).

The appellant had been employed on a number of short term contracts, the last of which was due to expire on October 26, 1968. On July 31, 1968 the appellant was given three months notice of termination of his contract of service and was given a sum of $32,000 "*ex gratia* as compensation for loss of employment". The Comptroller-General assessed to income tax the sum of $32,000. On appeal to the Special Commissioners they held that the sum was not compensation for loss of employment but a gratuity in respect of having or exercising employment and therefore taxable under paragraph (a) of sub-section (1) of section 13 of the Income Tax Act, 1967. This decision was upheld by the High Court and the appellant thereupon appealed to the Federal Court.

Held: (1) the payment in this case was not compensation for loss of employment;

(2) the payment was a gratuity in respect of having or exercising employment within the meaning of paragraph (a) of sub-section (1) of section 13 of the Income Tax Act, 1967 and therefore it was liable to tax.

Cases referred to:

(1) *Chibbett* v. *Joseph Robinson & Sons* 9 T.C. 48 at p. 61.

(2) *Comptroller-General of Inland Revenue* v. *T.* [1970] 2 M.L.J. 35, F.C.; [1972] 2 M.L.J. 73, 74, P.C.

(3) *McClelland* v. *Northern Ireland General Health Services Board* [1957] 2 All E.R. 129.

(4) *Holloway* v. *Toplar Corporation* [1940] 1 K.B. 173, 178.

(5) *Beynon* v. *Thorpe* 14 T.C. 1.

(6) *Duncan's Executors* v. *Farmer* 5 T.C. 417, 422.

(7) *Hochstrasser* v. *Mayes* [1960] A.C. 376.

(8) *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11 at p. 25.

(9) *Henry* v. *Foster* 16 T.C. 605, 634.

FEDERAL COURT.

S. Woodhull for the appellant.

Mohamad Nizar bin Idris (Federal Counsel) for the respondent.

In the court below the following judgment was delivered on August 19, 1972:

Gill F.J.: This is an appeal by way of case stated from an order of the Special Commissioners of Income Tax confirming the assessment by the Comptroller-General of Inland Revenue (the respondent) to income tax, as a gratuity under section 13(1)(a) of the Income Tax Act, 1967, the sum of $32,000 which was paid to the appellant *ex gratia* on the termination of his fifth contract of service with his employers by the giving of a three month's notice as provided under the contract to expire at the end of the period of the contract.

The facts as found by the Special Commissioners, about which there is no dispute, are that the appellant served his employers under five separate contracts of employment commencing on April 24, 1951, February 26, 1956, August 21, 1959, March 27, 1963 and October 26, 1966 respectively. Under each of the contracts the employer had a right to terminate the appellant's employment at any time during the period of the contract by giving him three calendar months' notice or by paying three calendar months' salary in lieu of notice. Although the appellant was in continuous employment up to October 31, 1968 when he was 41 years of age, which meant that the total period of his employment was 17½ years, he was in fact re-engaged at the commencement of each of his contracts of service.

His first contract of service, under a written agreement dated April 24, 1951 between him and the Oriental Estates Agency, London, was for a period of four years at the end of which he was given eight months' leave. His next three contracts were for

periods of three years each followed by six months' leave at the end of each period, there being a further written agreement during this period dated March 27, 1962 between him and Sime Darby Holdings Limited. Clause 2 of this latter agreement reads:

"The period of service shall be deemed to have begun and shall continue for a period of three years or such other period as shall be agreed with the Agents from the date of last returning to Malaya for service under the terms of the previously existing Agreement with Oriental Estates Agency Limited, London, and thereafter (unless the same shall have been previously determined as hereinafter provided by either party) shall be deemed to be an engagement from year to year determinable at any time by three months' notice on either side and subject to the terms and conditions herein contained".

His fifth and final contract of service, which was for two years followed by three months' leave, was due to expire on October 26, 1968.

On July 31, 1968 the appellant received a letter from Sime Darby Malaysia Berhad which stated, *inter alia*, as follows: —

"It is with regret that we find it necessary as part of the reorganisation of estates to give you three months' notice of the termination of your employment which notice commences on 1st August. You are due for three months' leave on the 26th October when you will have completed a two year tour. If you wish you may proceed on that date or before if it is convenient, or you may serve your notice to the 31st October. In the event that you leave before 31st October you will of course be paid salary, overseas allowance and children's allowance up to and including 31st October. Transport allowance and manager's allowance will cease on the date you leave the estate.

....

As compensation for loss of employment you have been accorded a sum of $32,000 *ex gratia*.

The tax complications relating to this *ex gratia* payment were explained to you this morning. Because of these we will not be able to pay the full amount of compensation immediately but subject to tax clearance in respect of your remuneration for 1968, we hope that it will be possible to pay you up to 50% of the compensation before you depart".

As stated by the Special Commissioners, the appellant was not re-engaged due to the reorganisation of the company's estates whereby their Gedong Estate and Soon Lee Estate were put under the jurisdiction of one manager. Under a scheme of "Proposed Compensation in cases of Possible Amalgamation" which the company had drawn up voluntarily by way of "Rationalisation of Estate Management", he was paid a 100% compensation of $32,000 by reason of his age and years of service.

On those facts of the case, what was contended before the Special Commissioners on behalf of the appellant was this. The agreement dated April 24, 1951 was the only contractual document between the appellant and his employer company, the other documents being merely extensions of the said agreement to define the periods of employment and periods of leave. As the appellant was under a continuous contract of service with the company, he was a permanent employee of the company. The sum of $32,000 paid to him was not a gratuity for services rendered but compensation for loss of office which came within the provisions of section 13(1)(e) of the Income Tax Act, 1967, so that it was wholly exempt from income tax by virtue of paragraph 15 of Schedule 6 to the said Act. In the alternative, the said sum of $32,000 was a voluntary payment not paid to the appellant by virtue of his employment, so that it was not a gain or profit from employment under sections 4(b) and 13(1)(a) of the Income Tax Act, 1967.

The contentions on behalf of the respondent were that the appellant was employed under five separate contracts for fixed periods, that his final contract of service was terminated by three months' notice in writing dated July 31, 1968 in accordance with the terms of the contract, and that the sum of $32,000 paid *ex gratia* to him was not compensation for loss of office but a gratuity for services rendered, so that it was a gain or profit from the appellant's employment and therefore assessable to income tax under the provisions of section 4(b) and section 13(1)(a) of the Income Tax Act, 1967.

In the event, the Special Commissioners accepted the contentions of the respondent and reached the conclusion that as the appellant was not a permanent employee of the company the sum of $32,000 paid to him was not compensation for loss of office but a gratuity in respect of services rendered and as such liable to income tax under section 13(1)(a) of the Income Tax Act, 1967.

It seems clear from what I have said so far that the question of law for the opinion of this court on the case stated is whether on the facts as found by the Special Commissioners the sum of $32,000 paid to the appellant should be treated as compensation for loss of office under section 13(1)(e) or as gratuity under section 13(1)(a) of the Income Tax Act, 1967. There is also the added question as to whether the said sum of $32,000 was a voluntary payment and therefore not a gain or profit from an employment within the meaning of sections 4(b) and 13(1)(a) of the said Act and as such outside the scope of the Act.

The reasons which the Special Commissioners have set out in their grounds of decision for their conclusion may be summarised as follows. The appellant was engaged in the first instance on contract for a term of 4 years. Subsequently he was re-engaged also on contract for three terms consisting of three years each. His final contract of service was for a term of 2 years expiring on October 26, 1968. Prior to the expiry of each contract, the company offered and the appellant accepted the offer of a fresh term of engagement for a term of years. In every instance he was re-engaged after the expiry of his leave under the previous contract, and his contract of service was determinable by 3 months' notice. The company, in accordance with the terms of the final contract of service, gave the appellant the prescribed notice of termination by letter dated July 31, 1968, so that it was patently obvious that the company exercised their rights under the terms of the contract of service. There being no agreement for the payment of any compensation or gratuity to the appellant on the determination of his contract of service, the sum of $32,000 was paid *ex gratia* under a scheme drawn up by the company *ex parte*. The scheme was based, *inter alia*, on the age of the employee and his years of service. It was therefore obvious that the said payment was a "gain or profit from employment" in the nature of a gratuity, and not com-

pensation for loss of employment. There was no evidence of "redundancy" in the true sense of the word, the company's so-called "reorganisation" or "amalgamation" being merely a means of cutting down on expenses, presumably due to the depressed price of rubber, by having one manager in charge of two estates. In a genuine redundancy the principle of "last in, first out", other things being equal, is generally valid, and yet the appellant was picked out for retrenchment notwithstanding the fact that there were no adverse reports against him. In the circumstances, it could not be said by any stretch of imagination that the appellant had a clear expectation of continued employment in the company until the retiring age of 55, when there was a fresh offer and acceptance of employment from one contract of service to the next.

The Special Commissioners go on to state in their grounds that it was not true to say that the appellant's employment was terminated because of reorganisation, the true position being that the appellant was not re-engaged after the expiry of the current contract of service due to the reorganisation of the company's estates. It is said that this finding of the Special Commissioners being in apparent contradiction of their finding of fact that the appellant was not re-engaged due to the reorganisation of the company's estates, the semantic refinement suggested is well beyond the ken and comprehension of the ordinarily informed. I do not think so. The subtle distinction may be said not to have been happily worded, but what the Special Commissioners were saying was that the appellant's employers could not offer him another contract, which they were certainly not obliged to do, because of the reorganisation of their estates. In my judgment nothing turns on this so-called contradiction.

The Special Commissioners have stated further that the appellant had no entitlement to employment after October 25, 1968, and that at most he merely had a prospect of his contract of employment being renewed. And they point out that the Act provides for exemption from income tax of "compensation for loss of employment", and not of compensation for loss of prospect of renewal of a contract of employment. These observations of the Special Commissioners are criticised on the ground that they contain a casuistry that must be beyond the grasp of the most tutored Jusuit. A short answer to this criticism is that the implication of what the Special Commissioners were saying is clear, namely, that this was not a case of deprivation of continuous employment under a contract of master and servant for a general hiring, a distinction which was brought out in what the Special Commissioners went on to say in the next paragraph of their grounds, to which I shall refer later.

The main ground of appeal is that as the appellant had a reasonable expection of continued employment or, in the words of Rowlatt J. in *Chibbett* v. *Joseph Robinson and Sons*,[1] his employment was likely to continue, the sum of $32,000 was paid to him by way of compensation for loss of employment. Reference is also made to what I said in the Federal Court in *Comptroller-General of Inland Revenue* v. *T.*[2] The arguments in support of this ground are that the appellant had served for a continuous period of 17½ years, that his contracts spoke of "tours of duty", that by clause 14 of the first written contract the appellant was required to be a member of the Provident Fund the rules of which applied only to permanent employees, that clauses 5 and 8 of the second written agreement refer to the "standard terms for Planters in force from time to time" which provided for normal retirement at the age of 55, and that the letter dated March 31, 1967 ("Exhibit A") written by the company to the appellant on the subject of Malayanisation confirms that "all expatriates will normally retire on reaching the age of 55". Reliance is also placed on the words "completion of each subsequent three years" in clause 8 of the second written agreement, notwithstanding the fact that those words are qualified by the words "should the Planter continue in the service of the Principal".

In my judgment, the fact that certain rules of the company which were applicable to permanent employees were also made applicable to the appellant cannot alter the fact that each of his "tours of duty" was on a contract of service for a definite time. His having been re-engaged on a fresh contract on the expiry of each of his previous contracts over a period of 17½ years did not make him a permanent employee as in the case of a general hiring for an indefinite time. It was on the basis of the distinction between a contract for a fixed period and a contract of general hiring that the Special Commissioners made their deciding order, as would seem clear from the following passage in their grounds of decision: —

> "The words 'loss of an employment which need not continue, but which was likely to continue' must be interpreted in the light of the facts in *Chibbett's* case which were that the contract of employment provided for continuous employment, the period of which was not fixed. The Federal Court in *T.'s* case approved of Rowlatt J.'s *dictum*, and in *T.'s* case the contract of employment also provided for continuous employment. Therefore the *dictum* does not apply to a case where the contract of employment fixed the period of employment and the payment was made where the employment ceased according to the period fixed in the contract of employment."

I am of the opinion that they were right in thus distinguishing this case from *T.'s* case. It is true that the contract of service in *T.'s* case was also liable to be terminated at any time by the employers giving three months' notice, but it was none the less a contract of general hiring for an indefinite time so as to be a contract of "continuous employment" as the Special Commissioners have described it, in my opinion quite rightly. And it is, no doubt, true that a general hiring without more is terminable on reasonable notice (see *McClelland* v. *Northern Ireland General Health Services Board*[3]). Therein lies the difference between this case and *T.'s* case. The other difference is that in *T.'s* case the money was paid under a fresh agreement abrogating the contract of service, whereas in the present case it was money gratuitously granted or paid, whether in one sum or in instalments, which is what a gratuity means (see *Holloway* v. *Poplar Corporation*[4]). I must therefore reject the argument that the amount paid to the appellant in this case is not chargeable under any section of the 1967 Act other than section 13(1)(e) as compensation for loss of employment.

A ground of appeal in the alternative is that, as the appellant had no entitlement under any of his contracts of service from time to time to the sum of $32,000 which was paid to him, it was a payment not made in respect of his employment but a voluntary payment. In other words, it is suggested that it was a gift of a personal nature as in the case of *Beynon (H.M. Inspector of Taxes)* v. *Thorpe*[5]). I do not think I can accept that suggestion in the light of the clearest possible evidence that the payment in this case was made in reference to and by virtue of the appellant's employment. It is also said that the words "in respect of having or exercising the employment" in section 13(1)(a) of the Income Tax Act, 1967 require the payment to be of a contractual nature, a payment to which the tax payer is legally entitled. But I can find no justification for placing any such construction on these words. It is next pointed out that these words do not have the same meaning as the words "in respect of employment" in section 10(2)(a) of the Income Tax Ordinance, 1947. To my mind there is no difference between a "gratuity in respect of employment" and a "gratuity in respect of having or exercising the employment". The latter phrase, if anything, has a much wider meaning.

It is conceded that there are numerous authorities for the proposition that a voluntary payment to the holder of an office made by virtue of his office or employment is taxable notwithstanding that there may not be any legal obligation to make the payment, but it is argued on the authority of *Duncan's Executors* v. *Farmer*[6]) that a payment made when the recipient is no longer in office or employment is not a profit of office or employment. I do not see the cogency of that argument in relation to an *ex gratia* payment made on the termination of a person's employment, as it would be a payment in respect of having or exercising the employment, especially when the payment is related to the total period of his employment.

In the leading case of *Hochstrasser* v. *Mayes*,[7]) Viscount Simonds said:

> "Upjohn J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved upon. 'In my judgment', he said, 'the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future'. In this passage the single word 'past' may be open to question, but apart from that it appears to me to be entirely accurate."

It would seem clear that in the present case the payment to the appellant was made in reference to his services and that it was something in the nature of a reward for his services.

It is common ground that what has to be ascertained is the true character of the payment of $32,000 in the light of the facts leading up to such payment. In the words of Viscount Simon in *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society*,[8]) the question always is what is the real character of the payment, not what the parties call it. I need hardly add that although the employers chose to call their scheme under which the appellant was paid the sum of $32,000 a scheme of compensation, it was in reality a scheme for the payment of a gratuity to its staff on the basis of age and years of service. What the appellant had was an *ex gratia* payment of $32,000 for the services rendered. It was in no way related to the period for which he could have gone on working had he been kept in employment until the retiring age of 55. It is therefore liable to tax as gratuity in respect of having or exercising the employment, under section 13(1)(a) of the Income Tax Act, 1967. That being so, the appeal fails and must be dismissed with costs.

[*From this decision the tax-payer appealed to the Federal Court. In the Federal Court, the following judgment was delivered:*]

Suffian F.J. (reading the judgment of the Federal Court): An expatriate rubber planter, the appellant-taxpayer whom we shall refer to hereinafter simply as the taxpayer, was given three months' notice of termination of his service with his company. The letter containing the notice also stated that by way of compensation for loss of employment the taxpayer had been accorded a sum of $32,000 *ex gratia*.

He was assessed to income tax by the Comptroller-General of Inland Revenue (respondent) on the $32,000. This decision was upheld by the Special Commissioners, and again by Gill F.J. sitting in the High Court on a case stated. The taxpayer has appealed to this court.

The relevant statutory provisions are contained in sections 3(a), 4(b) and 13(1)(a) and (e) of the Income Tax Act, 1967. These are as follows.

Section 3(a) provides:

> "... income tax shall be charged ... in the case of a person ordinarily resident ... upon his income ..."

Section 4(b) provides:

> "... the income upon which tax is chargeable under this Act is income in respect of gains or profits from an employment."

Section 13(1) provides:

> "Gross income of an employee in respect of gains or profits from an employment includes:
>
> (a) any ... gratuity ... in respect of having or exercising the employment;
>
> (e) any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment ...."

Thus the primary question is whether the sum of $32,000 was a *gratuity in respect of having or exercising employment*, as the Revenue contends, or *compensation for loss of employment*, as the taxpayer contends. If the former, it is fully taxable; if the latter, it is also taxable but subject to the limits imposed by paragraph 15(1)(b) of Schedule 6 which we are told from the Bar make it wholly exempt in the circumstances of this particular case.

The facts found by the Special Commissioners are as follows.

On 24th April, 1951, the appellant taxpayer entered into a written agreement with his employers, the Oriental Estates Agency Ltd., whereby the parties agreed that the taxpayer be engaged by the company as an assistant manager for a term of four years commencing on 26th May, 1951.

On 25th June, 1955, the taxpayer proceeded on leave for eight months.

The taxpayer was then re-engaged on contract for a term of three years commencing 26th February, 1956, until he went on leave for six months on 21st February, 1959.

The taxpayer was then re-engaged on contract for a further term of three years commencing 21st August, 1959, until he went on six months' leave on 28th September, 1962.

The taxpayer was then re-engaged on contract for a further term of three years commencing 27th March, 1963, until he went on six months' leave on 27th April, 1966.

The taxpayer was finally re-engaged on contract for a term of two years commencing on 26th October, 1966, and expiring on 26th October, 1968.

By letter dated 31st July, 1968, the taxpayer was given three months' notice terminating his service in accordance with his contract of service. By the same letter the company accorded to the taxpayer a sum of $32,000 *ex gratia* "as compensation for loss of employment", and said that the taxpayer was not being re-engaged owing to reorganisation making it necessary for two estates of the company (of one of which the taxpayer was manager) to be put under one manager.

That letter was Exhibit A8 at page 117 of the record. Relevant extracts from it read as follows:

"It is with regret that we find it necessary as part of the re-organisation of estates to give you three months' notice of the termination of your employment which notice commences on 1st August. You are due for three months' leave on the 26th October when you will have completed a two-year tour. If you wish, you may proceed on that date or before if it is convenient, or you may serve your notice to the 31st October. In the event that you leave before 31st October you will of course be paid salary, overseas allowance and children's allowance up to and including 31st October. Transport allowance and manager's allowance will cease on the date you leave the estate.

....

As compensation for loss of employment you have been accorded a sum of $32,000 ex gratia..."

The *ex gratia* payment of $32,000 was under a scheme of "proposed compensation" in case of "possible amalgamations" drawn up by the company *ex parte*. According to that scheme the taxpayer was eligible for 100% compensation because he was aged 41 and had served about 17½ years.

On those facts, what was contended before the Special Commissioners on behalf of the taxpayer was this. The agreement dated 24th April, 1951, was the *only* contract of service between the taxpayer and his company, the other documents being merely extensions of the said contract to define the periods of employment and periods of leave. As the taxpayer was under a *continuous* contract of service with the company, he was a *permanent* employee. The sum of $32,000 paid to him was not a gratuity for services rendered but compensation for *loss* of employment within paragraph (e) of subsection (1) of section 13 of the Income Tax Act, 1967, so that it was taxable subject to the limits imposed by paragraph 15 of Schedule 6 to the Act. In the alternative it was contended by the taxpayer that that sum was a voluntary payment not paid to him by virtue of his employment, so that it was not a gain or profit from employment under sections 4(b) and 13(1)(a) of the Act.

The contentions on behalf of the Revenue were that the taxpayer was employed under five *separate* documents for fixed periods, that his final contract of service was terminated by three months' notice *in accordance with* the terms of the contract, that the sum paid *ex gratia* to him was *not* compensation for loss of employment but a *gratuity in respect of having or exercising employment*, so that it was a gain or profit from the taxpayer's employment and therefore assessable to tax under paragraph (a) of subsection (1) of section 13.

In the event the Special Commissioners accepted the contentions of the Revenue, and held that the sum was not compensation for loss of employment, but a gratuity in respect of having or exercising employment and therefore taxable under paragraph (a) of subsection (1) of section 13.

They were of the opinion that there were five separate contracts of service between the taxpayer and his company, the final one being for a term of two years commencing on 26th October, 1966, which was determinable by three months' notice on either side, that the company gave the taxpayer notice in accordance with that contract, and that the company was exercising its right under the terms of the contract of service. The Special Commissioners said that it was not true that the taxpayer's employment was terminated because of re-organisation, and that the true position was that the taxpayer was not re-engaged after the expiry of the current contract of service, owing to estate reorganisation. They found that there was no agreement for the payment of any compensation or gratuity to the taxpayer on the termination of his contract of service, that the company had *ex parte* drawn up the compensation scheme, that payment under it was a "gain or profit from employment", and not compensation for loss of employment, and that it was in the nature of a gratuity within the meaning of section 13(1)(a). They found that the taxpayer could *not* have a clear expectation of continuous employment with the company until the retirement age of 55, that there was a *fresh* offer and acceptance of employment from one contract of service to the next, that the taxpayer was not *entitled* to employment after 25th October, 1968, that at most he merely had the prospect of his service contract being renewed, and that the taxpayer's employment was not employment "which was *likely* to continue" within the meaning of *Chibbett's* case[1] because it *fixed* the period of employment and

ceased at the end of the period fixed in the service contract. For the above reasons the Special Commissioners decided that the taxpayer was not a permanent employee of the company and that the sum of $32,000 paid to him was therefore not compensation for loss of office but a gratuity.

The learned judge upheld the decision of the Special Commissioners, and the taxpayer has appealed to this court.

The learned judge held that the taxpayer's contract of service was not a contract of general hiring for an indefinite time, that therefore there was no likelihood of his employment continuing, and that the money paid to the taxpayer was not compensation for loss of employment under section 13(1)(e).

He further held that the money paid was in reference to and by virtue of the taxpayer's employment, that it was not a voluntary payment, that the payment was something in the nature of a reward for the taxpayer's services, that the scheme of compensation in the event of possible amalgamations devised by the company was in reality a scheme for the payment of a gratuity to its staff on the basis of age and years of service, and that therefore the money paid to the taxpayer was liable to tax as a gratuity in respect of having or exercising employment under section 13(1)(e).

In determining the question whether the money received by the taxpayer is a gratuity in respect of having or exercising employment or compensation for loss of employment, what his employers call it is not conclusive and regard must be had to its true character, for as was stated by Viscount Simon in *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society*: [8]

"... the question always is: what is the real character of the payment, not what the parties call it."

In *Comptroller-General of Inland Revenue* v. *T.*[2] Lord Wilberforce giving the advice of the Privy Council said:

"The question, under section 10(2)(a) (of the Income Tax Ordinance, 1947), is whether the money was paid in respect of the employment'. If the fact is that it was paid in respect of the loss of the employment, it does not come within the taxing words."

Though that was a case under the 1947 Ordinance where a gratuity was taxable if "paid or granted in respect of the employment", in contrast to a gratuity "paid in respect of *having or exercising* the employment" which is taxable under the 1967 Act, in our judgment the principle laid down by Lord Wilberforce applies to this case, namely, that money or compensation paid in respect of *loss* of employment is not taxable, as is common ground.

There is no doubt that the taxpayer has received compensation. The only doubt is whether that compensation was for loss of employment.

It is conceded on behalf of the taxpayer that his employment was not permanent, but it is submitted that it need not be permanent, and that it is enough if it was *likely to continue*. Reliance is placed on *Chibbett* v. *Joseph Robinson and Sons*[1] where Rowlatt J. said at page 61:

"... compensation for loss of an employment *which need not continue, but which was likely to continue*, is not an annual profit within the scope of the Income Tax at all."

It is submitted that on the evidence the taxpayer's employment was likely to continue until the usual retiring age of 55 for planters employed by the company. His counsel urges that the following be taken into consideration by the court. Though the first service contract (1951) mentioned an initial term of four years, the taxpayer had served continuously for 17½ years on five contracts up to the age of 41. Each of these contracts was terminable at any time by three months' notice. The first contract was for a "tour of duty of four years" after which the taxpayer was entitled to leave in Europe. By clause 4 of that contract the taxpayer was required to be a member of the company's provident fund, the rules of which applied only to permanent employees. A circular letter from the company dated 1st December, 1953, referred to his normal *first* tour of service in Malaya as four years, and thus implied that there would be *other* tours of service. The service agreement of 27th March, 1962, referred in clause 8 to leave after the contractual period of three years and on the "completion of *each subsequent* three years". Clauses 5 and 8 of that agreement referred to the "standard term for planters in force from time to time" which provided that the normal retirement date of planters shall be the 55th birthday. The service agreements and the standard terms contemplated *succeeding* tours of service. The letter of 2nd July, 1964, from the company to the taxpayer referred to substantive salary payable after completion of *15* years as being $1,500 per month. A letter of the company dated 31st March, 1967, advising the taxpayer in view of the prospective Malayanisation policy, confirmed that "all expatriates [such as the taxpayer] will normally retire on reaching the age of 55". It further stated —

"We do not expect that Government's Malayanisation policy for the planting industry will affect the normal prospects of employment in West Malaysia of expatriate employees now employed in the planting industry here until at least the end of 1975 and probably not until they reach the normal retirement age of 55 years. The taxpayer's interests in the company provident fund were transferred to a revised scheme in 1965 and according to the rules of the fund 'retirement age' is defined as 'the age of 55 or such higher age not exceeding 65 as the employer may select in writing to the trustees on admission to the scheme'."

It is submitted that the above conclusively establishes that the taxpayer's employment was one that was in Rowlatt J.'s phrase "likely to continue" and the taxpayer had every expectation of continuing in employment until retirement age, and that therefore the money paid to the taxpayer was compensation for loss of employment.

With respect we do not agree that the test is as laid down by Rowlatt J. With respect we prefer to follow the test laid down by Romer J. in *Henry* v. *Foster*[9] where he said when referring to compensation for loss of employment:

"... as I understand it, it means a payment to the holder of an office as compensation for being *derived* of profits to which as between himself and his employer he would, but for an act of deprivation by his employer.... have been *entitled*."

From this, in our view the test to be applied in the instant case is whether the taxpayer when his service had been terminated was deprived of profits to which he was entitled, and for which deprivation the $32,000 represented compensation.

With respect we accept the argument of the Revenue. The taxpayer here was under contract to serve until 26th October, 1968. He was given due notice under which his service was to end not earlier than, but exactly on 26th October, 1968. In the circumstances we do not think that he has been deprived of anything to which he was entitled, for which deprivation the $32,000 represented compensation. We would therefore hold that that money was not compensation for loss of employment.

We now turn to the alternative argument on behalf of the taxpayer that the money was a voluntary one not made in respect of his employment, and therefore not gains or profits from employment taxable under section 4(b).

It is conceded on his behalf that a voluntary payment made to the *holder* of an office by virtue of his employment is taxable, notwithstanding that there may not be any legal obligation to make the payment, but it is urged that we are not here concerned with payments to the holder of an office, but with payments made to a person who has *ceased* to hold office. *Duncan's* case[6] is cited as authority for the proposition that a payment to a *former* holder of an office because he is no longer in the office is not a profit of the office, and therefore is not taxable.

Beynon's case[5] is also relied on, where Rowlatt J. stated at page 14 —

"(The payment in that case) is nothing but a gift moved by the remembranee of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude for that sort of moral obligation if you please, it is merely a gift of that kind. In this case it happens to be very large; in many cases it is very small but in other cases it seems to me whether it is a large gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or other...."

It is urged that in the absence of any contractual or legal agreement or obligation and in the light of the unexpected termination of the taxpayer's employment, the $32,000 here was a payment of the kind mentioned by Rowlatt J.

Comptroller-General of Inland Revenue v. *T.*, *supra*, is also relied on. There the taxpayer's employment was terminated *without* notice, and it is submitted that that was why the Privy Council held that the payment was not wholly voluntary. In *Comptroller-General of Inland Revenue* v. *T.* the Privy Council said —

"Their Lordships revert, finally to the facts of this payment. Although not made directly as consideration for an agreement by the (taxpayer) that his employment should be abrogated, it would be wrong... to regard it as a wholly voluntary payment. The company was under a legal obligation to give the (taxpayer) three months notice. It was under a moral obligation to treat him fairly, if not generously, after eleven years' employment. In fact it paid him the equivalent of eleven months' salary, it paid his passage home and he made no claim in respect of the failure to give him three months' notice."

It is submitted that in this case there *was* notice given to the taxpayer and that the company having discharged all legal obligations, the payment of $32,000 to the taxpayer upon the termination of his employment was a voluntary payment outside the scope of the Income Tax Act.

With respect we agree with the learned judge that the payment here was a gratuity in respect of having or exercising employment within the meaning of paragraph (a) of subsection (1) of section 13. There is clear evidence that the payment, though not of a contractual nature to which the taxpayer was entitled, was made *in reference to and by* virtue of his employment, especially when it is remembered that the quantum was related to the total period of his service.

In the leading case of *Hochstrasser* v. *Mayes*[7] Viscount Simonds said —

"Upjohn J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved upon. 'In my judgment', he said, 'the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment, not every payment made to an employee is necessarily made to him as a profit arising from his employment. *Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services* past, present or future.' In this passage the single word 'past' may be open to question, but apart from that it appears to me to be entirely accurate."

It is clear, as stated by Gill F.J., that in the present case the payment to the taxpayer was made in reference to the services rendered by the taxpayer by virtue of his office, and that it was something in the nature of a reward for his services, that the scheme of compensation drawn up by the company was in reality a scheme for the payment of a gratuity to its staff on the basis of age and years of service and that therefore it is liable to tax as a gratuity in respect of having or exercising his employment within the meaning of paragraph (a) of subsection (1) of section 13.

We would therefore regretfully dismiss this appeal with costs.

Appeal dismissed.

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